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No. 85-1362

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PAUL A. STERN, ET AL, *Petitioners*

v.

TARRANT COUNTY HOSPITAL DISTRICT, *Respondent*

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

Respondent's Brief in Opposition

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QUESTIONS PRESENTED

Petitioners present the following questions for review:

1. Whether the equal protection clause forbids a state agency from purposefully and arbitrarily discriminating against one class of persons by denying staff privileges to osteopathic physicians in preference to a similarly situated class of persons.

2. Whether the Fourteenth Amendment prohibits a state from denying to all persons within its jurisdiction equal protection of its laws resulting from the discriminatory administration of a state law by a state agency.

3. Whether the due process clause prohibits a state agency from purposefully and arbitrarily depriving osteopaths of their statutorily created property interest of being considered for staff privileges based on professional and ethical merit and not on the basis of their medical degree.

4. Whether the Fifth Circuit may ignore the "clearly erroneous" mandate of Rule 52a Fed. R. Civ. P. and disregard findings of fact found by the district court and not challenged on appeal.

5. Whether a rational basis for the actions of a state agency can "reasonably be conceived" when those actions are in violation of state law and intentionally discriminate against one class of persons while favoring another.

6. Whether the conduct of a state agency, clearly acting in violation of state law, is entitled to the same presumptive validity afforded legislative enactments.

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STATEMENT OF THE CASE

The factual background is set out in the opinion of the Court of Appeals, 778 F.2d 1054-1055. Petitioners assert that they were denied staff privileges by Respondent solely on the basis of their osteopathic medical degree. However, the requirement which Petitioners failed to meet and which is challenged herein was the completion of a postdoctoral training program accredited by the Liaison Committee on Graduate Medical Education (now known as the Accreditation Committee on Graduate Medical Education). As stated by the District Court: "All parties before the Court agree the denial of staff membership for all Plaintiffs was based solely on their lack of training in an LCGME program." 565 F. Supp. at 1448. The District Court found that four osteopathic physicians had completed the required training and had been granted staff privileges. 565 F. Supp at 1453. The Hos-

pital District bylaw in question has been changed to drop the requirement challenged herein as denying the equal protection of the laws.

REASONS FOR DENYING THE WRIT

I. The En Banc Opinion of the Court of Appeals Properly Applied the Equal Protection Clause of the Fourteenth Amendment

Petitioners urge the adoption of a per se equal protection analysis as adopted by the Panel decision of the Court of Appeals but rejected by the En Banc decision of the Court of Appeals. First, the challenged bylaw did not violate the Texas Medical Practice Act, Article 4495b, Subch. A, §1.02(9), V.T.C.S. prohibiting discrimination solely on the basis of academic medical degree. The bylaw imposed a postdoctoral training requirement which was met by certain osteopathic physicians who were granted staff privileges. Second, even if the bylaws were shown to be inconsistent with the state statute, the Court of Appeals properly viewed the guarantees of the Fourteenth Amendment as turning on federal constitutional standards of equality and rationality rather than on state standards. To the extent that discrimination on the basis of academic medical degree is prohibited by the state statute, such a policy should not be viewed as binding the federal courts as to what is a rational classification within the protections of the Equal Protection Clause.

Petitioners rely upon *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) in support of the contention that a state agency's classification in the face

of a state law necessarily denies equal protection. As explained by the Court of Appeals, while *Yick Wo* recognized that a state statute which is neutral on its face may be applied in an unconstitutionally discriminatory manner, the decision "does not replace the Constitution with state law as the benchmark that determines which classifications are permissible." 778 F.2d at 1057.

The Court of Appeals relies upon the holding in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944) which recognized that the fact that a state agency acts in violation of a state law does not in itself show a violation of the federal equal protection clause. It is respectfully submitted that the Court of Appeals properly made an independent judgment on the rationality of the challenged bylaw.

Petitioners urge that the Court of Appeals was bound by the District Court's Findings of Fact in determining whether there was a "conceivable basis" for the classification made by the challenged bylaw. None of the cases cited by Petitioners in support of this theory involved the application of the Equal Protection Clause, however, and do not support Petitioners' contention that the appellate courts are bound by findings of fact of the District Court in determining whether or not a rational basis exists for a state regulation.

As explained in the opinion of the Court of Appeals, a factual conclusion about an historical fact could not be used to displace a legislative judgment and bind the appellate courts on the constitutionality of the challenged bylaw. 778 F.2d at 1060.

The Court of Appeals followed the rational basis test of whether the legislative facts on which the classification is apparently based could reasonably be conceived to be true by the governmental decisionmaker. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). Following the reasoning of *Hayman v. City of Galveston*, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927) and *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982) the Court of Appeals recognized that the philosophical and other differences between allopathic and osteopathic medicine can demonstrate a rational basis for classifications distinguishing between the two.

It is respectfully submitted that the District Court's Findings of Fact did not prevent the appellate courts from making the determination of whether the rational basis test was met.

II. The Decision of the Court of Appeals Will Not Have the Far-reaching Effects Contended by Petitioners

Petitioners contend that the decision of the Court of Appeals will adversely affect osteopathic physicians who now or in the future will seek to practice medicine in Tarrant County, Texas and surrounding areas. The bylaw in question was amended on January 23, 1986 prior to the filing of the Petition for Writ Of Certiorari. The present Section 3.11 reads as follows: "Physicians applying for membership shall be legally licensed to practice in Texas." Therefore, the postdoctoral training requirement upon which Petitioners were originally denied staff privileges no longer exists, and osteopathic physicians will not be affected by the repealed requirement; nor will

indigent or non-indigent patients be affected by the repealed requirement.

As to the contention that other public hospitals will discriminate against osteopathic physicians because of the decision of the Court of Appeals, there is no evidence that the postdoctoral training requirement upheld as constitutional is imposed by any other hospital. Moreover, if as contended by Petitioners such a requirement violates Texas law, a remedy in the state courts would be available to set aside such a requirement. In any event, any such effects as predicted by Petitioners do not affect the validity of the conclusion of the Court of Appeals on the constitutional issue presented by this case.

III. The Court of Appeals Did Not Fail to Give Proper Consideration to the Findings of Fact of the District Court

Petitioners contend that the District Court's Findings of Fact "conclusively established" the lack of a rational basis for the challenged requirement and that such findings are determinative of the constitutional issue raised on appeal. As discussed above, the Court of Appeals distinguished between historical facts and legislative facts which are pertinent to the issue on appeal and which are not within the province of the District Court to bind the appellate courts.

Petitioners cite no particular findings which support their contention, and it is respectfully submitted that any "finding" which would purport to conclusively establish the determination of the equal protection constitutional issue would be in reality a conclusion of law rather

than a finding of fact with any binding effect on the appellate courts.

A review of the opinion of the Court of Appeals reveals that the evidence was considered including both contemporary and historical matters, and it is respectfully submitted that the Court of Appeals did not fail to give deference to the findings of the District Court where appropriate.

CONCLUSION

For the above and foregoing reasons, Respondent asks that the writ of certiorari not issue to review the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of the above and foregoing brief have on this 9th day of April, 1986 have been served upon counsel for Petitioners by mailing the same postage prepaid and addressed as follows:

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